IN THE

Supreme Court of the United States

October Term, 1961

No. [illegible]

ROBERT F. KENNEDY, Attorney General of the United States,

Appellant,

v.

FRANCISCO MENDOZA-MARTINEZ,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Northern Division

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

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Statement of Interest

This brief *amicus curiae* is submitted with the consent of the parties, filed with the Clerk of this Court.

The American Civil Liberties Union, a national non-profit organization established in 1920, is committed to the inseparable purposes of preserving the democratic principles for which our government was established and to maintaining our civil liberties. Together with all Americans who prize the blessings of United States citizenship and the privileges of freedom which it brings, it seeks to guard against arbitrary deprivations of our birthrights.

It believes that there has been an increasing tendency on the part of Congress, through expatriation laws, to encroach upon the right of American citizenship given to individuals under the Fourteenth Amendment to our Constitution. It submits this brief in an effort to assist the Court in its analysis of this encroachment and the constitutional problems thereby raised.

Statute Involved

The Nationality Act of 1940 as amended (54 Stat. 1137, 58 Stat. 4, 746; 8 U. S. C. 801) provided:

> "Section 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * *
>
> "(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."

Question Presented

As *amicus* believes that the issue of collateral estoppel will be fully discussed in appellee's brief, we confine our discussion to the underlying constitutional question, *i.e.*, Is the provision of 401(j) of the Nationality Act of 1940 decreeing forfeiture of citizenship by a native-born American who remained outside the United States to avoid military service, within the constitutional power of Congress?

Statement of Case

Appellee, Francisco Mendoza-Martinez, born in the United States in 1922, became a citizen of the United States and of Mexico at birth. In 1942 he departed for Mexico for the purpose of evading service in the Armed Forces of the United States. His return to the United States in 1946, was followed by a conviction in 1947 upon a plea of guilty for violation of Section 11 of the Selective Service and Training Act of 1940 (50 U. S. C. App. 311). In 1953 appellee was ordered deported as an alien. This declaratory judgment action was filed in the United States District Court for the Southern District of California pursuant to 8 U. S. C. 903 to establish his claim to American citizenship. In a memorandum and order filed September 24, 1958, the District Court, following the reasoning of this Court in *Trop* v. *Dulles*, 356 U. S. 86, ruled that 401(j) of the Nationality Act of 1940 was unconstitutional and that the appellee was therefore entitled to a declaration of citizenship.

This Court, in *Mackey, et al.* v. *Mendoza-Martinez*, 362 U. S. 384, remanded the cause to the District Court for consideration of the issue of collateral estoppel. On such remand the United States District Court (S. D. Cal., N. D.) held that there had been no estoppel "by virtue of the criminal indictment and conviction of the plaintiff for draft evasion, or for any other reason, from asserting that the plaintiff has lost his * * * United States nationality and citizenship" and again affirmed its preceding unreported memorandum decision that "Section 401(j) of the Nationality Act of 1940 * * * is unconstitutional, both on its face and as applied to the plaintiff herein." (*Mendoza-Martinez* v. *Rogers*, 192 F. Supp. 1, at p. 2). From this decision the appellant has taken the instant appeal.

Summary of Argument

Section 401(j) of the Nationality Act of 1940 was constructed from the same mold as 401(g), which this Court found invalid in *Trop* v. *Dulles*, 356 U. S. 86. The Attorney General and Congress relied upon the Civil War statute of March 3, 1865 (13 Stat. 490, 37 Stat. 356) as amended, for precedent in the enactment of 401(j). House Report 1229, 78th Cong., 2nd Sess., p. 2. It likewise was the precedent for 401(g). The cases all recognize this Civil War statute as being highly penal. *Huber* v. *Reily*, 53 Pa. St. 112 (1866); *Kurtz* v. *Moffitt*, 115 U. S. 487, 501; *Trop* v. *Dulles*, 356 U. S. 86, 94, 108.

The specific legislative history of 401(j), moreover, reveals the express and sole purpose of Congress to punish the draft delinquent. Congressional leaders stated this as their objective in the debates leading to the passage of the statute, 90 *Cong. Rec.* 3261-2, 7629. The Department of Justice regarded expatriation and banishment from the United States as the proper substitute for criminal prosecution of the draft evader who absconded to foreign shores. Department of Justice Circular No. 3893, December 5, 1944, see Appendix, *infra*. This is the appellant's purpose here: to impose upon the appellee, a citizen of the United States by birth, expatriation, banishment and criminal punishment. However, the expatriation and banishment would be imposed not as part of the criminal conviction—because none is required under the statute—and without any of the safeguards of a civil or criminal trial.

The punishment of expatriation and banishment sought to be meted out to appellee is the naked vengeance, the prescription of reprimand without rehabilitation, which is condemned in the *Trop* case. Trop might reenlist or become reactivated during wartime and regain his citizenship [8 U. S. C. 801(g), 8 U. S. C. 1481(a)(8)]. No statutory provision exists for restoration of citizenship

for the draft delinquent who has departed to avoid military service or training. He is not only expatriated but permanently barred from the United States and all his ties here. 8 U. S. C. 136(d)(1); 8 U. S. C. 1182(a)(22).

The imposition of exile and expatriation for the draft delinquent find no justification in the foreign affairs powers. Neither the history of 401(j) nor the background of this case reveal any foreign involvement, any defection to a foreign power, or any political allegiance to another country other than the law-abiding presence of a dual national in the country of one of his nationalities. There is no more reasonable relationship to the war powers in expatriating the draft delinquent than the deserter. Indeed, if distinctions are to be made, Section 401(j) finds less support in the war powers, for as contemporaneously construed by the Attorney General who sought its passage, it was intended to bar the return of draft delinquents to the United States, instead of to encourage their service in the armed forces. Expatriation and exile permanently preclude the draft delinquent from changing his mind or seeing the error of his ways. Expatriation and exile of the draft delinquent are not a proper exercise of sovereignty any more than they are a proper function of the war power or the power to conduct foreign relations.

Finally, since the penalty of denationalization may be imposed without a prior conviction for the proscribed conduct, Section 401(j) comes within the ban of *Huber* v. *Reily, supra,* and *Kurtz* v. *Moffitt, supra.* None of the safeguards of a criminal trial are afforded an expatriated citizen before the sanction is imposed against him. And while he is not deprived of his right to assert his citizenship in the courts of the United States, the citizen abroad who has been denationalized will either be limited to a trial *in absentia,* or must submit himself as an alien in the administrative agencies and courts of the United States with all of the disabilities which that status entails. 8 U. S. C. 1227,

1503. Although the handicaps of the expatriated citizen who is in the United States are not as severe, the initial burden is upon him to prove his citizenship, as the appellant concedes (Appellant's Brief, p. 52) rather than upon the Government to establish denationalization.

The expatriation of a national of the United States, in these circumstances, is a denial of due process.

Argument

Before turning to the background of Section 401(j) of the Nationality Act of 1940 and the constitutional issues it presents, we summarize briefly the historical development of the American expatriation laws for a fuller understanding of the concepts which gave rise to those laws.

Originally an individual was denied the right to expatriate himself without the consent of his soverign. The right to become an expatriate, without regard to the sovereign's will, was thereafter proclaimed as a natural and inherent right of all people (15 Stat. 223). However, the right was denied during wartime and was also not extended to those under twenty-one. It was also denied to our citizens as long as they remained in the United States.

With the enactment of the Nationality Act of 1940, earlier limitations were cast aside. Congress authorized expatriation in several cases without departure to foreign shores. Wartime expatriation was sanctioned as was the expatriation of persons under twenty-one. Previously, the individual fought his sovefign for the right to cast off his citizenship. After 1940, it was the sovereign who fought for the right to impose expatriation upon the individual. Originally, expatriation was the voluntary abandonment of citizenship. *Mackenzie* v. *Hare*, 239 U. S. 299; *Savorgnan* v. *United States*, 338 U. S. 491; and *Perez* v. *Brownell*, 356 U. S. 44, each sustained specified overt acts

as evidence of a voluntary relinquishment of United States citizenship but only where it involved a nexus with a foreign sovereignty.

Here the appellant seeks to expatriate a citizen for the performance of proscribed acts, even if it does not evince attachment to a foreign government. How far may the Government proceed in compelling a native-born citizen to become an expatriate against his will, under what circumstances may it do so, and to what constitutional safeguards is the citizen entitled? These are the issues posed by this litigation.

A. The American Doctrine of Expatriation

The American colonists came to these shores with a background of English common law which included the doctrine that citizenship was immutable. Under this doctrine, no man might abjure his native country nor the allegiance which he owed his sovereign. *Coke's Littleton*, 129(a); *MacKenzie* v. *Hare*, 239 U. S. 299; 9 *Op. Atty. Gen.* 356. This common law principle, of course, resulted in conflicting claims to the allegiance of individuals who became naturalized under our laws. It was the subject of controversy between the United States and Great Britain,[1] between Jefferson and Hamilton [2] and between members of the judiciary of the various state courts.[3]

Thomas Jefferson, the great exponent of the theory emphasizing the rights of the individual as against those of the government, was the first American to advocate the

[1] The impressment of British seamen who had become Americans was one of the causes of the War of 1812. *II Richardson, Messages and Papers of the Presidents*, p. 485.

[2] *Tsiang, The Question of Expatriation in America Prior to 1907*, p. 28. Hamilton believed that the right of expatriation would encourage desertion and was, therefore, subversive of government. *IV Works of Alexander Hamilton*, p. 256.

[3] *Tsiang, supra*, pp. 69-70.

principle of expatriation. In 1779 he drafted the Virginia law code, in which expatriation was declared to be:

> "a natural right which all men have of relinquishing the country in which birth or other accident may have thrown them, and seeking subsistence and happiness wheresoever they may be able, or may hope to find them."[4]

In 1868; Congress acknowledged that the rights of the individual prevailed over the sovereign's claim to perpetual allegiance. The Act of July 27, 1868 (15 Stat. 223) declared that "the right of expatriation is a natural and inherent right of all people."

Responding to Presidential requests,[5] the Expatriation Act of 1907 (34 Stat. 1228) defined the methods by which expatriation might be accomplished. Naturalization in a foreign state and subscription to a foreign oath of allegiance were the two recognized means of expatriation under this law. Expatriation during wartime was forbidden. The theory behind this prohibition was that in time of war "the Government should be able to control the services of every citizen, and the right of changing allegiance should not exist when the State is in peril." *House Doc. 326*, 59th Cong., 2nd Sess., p. 28. Secretary of State Fish said:

> "to admit the right of expatriation, 'flagrante bello', would be to afford a cover to desertion and reasonable aid to the public enemy."

The Nationality Act of 1940, as amended (54 Stat. 1137, 58 Stat. 4, 58 Stat. 677; 8 U. S. C. 802) expanded the grounds of expatriation for native-born citizens to include foreign military service, foreign civil service, voting in foreign

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[4] *Tsiang, supra*, pp. 25-56.

[5] See annual messages of Presidents Grant, Cleveland and Theodore Roosevelt in 1873, 1884, 1885 and 1904. *Richardson, Messages and Papers of the Presidents*, Vol. VII, pp. 239, 291, Vol. III, p. 336, Supp. 2 (Lewis), p. 851.

elections, renunciation before a consul abroad, renunciation during wartime, draft dodging, treason and desertion. Wartime expatriation was no longer barred. On the contrary, expatriation for desertion, draft dodging and by renunciation in the United States [8 U. S. C. 801(g), (i) and (j)] might only take place during wartime or a national emergency. Expatriation for desertion, treason and by renunciation during wartime [8 U. S. C. 801(g), (h) and (i)] was not dependent upon departure from the United States. Congress, however, acknowledged that "Ordinarily, departure from the country of which a person has been a national is regarded as an essential element of expatriation". *Hearings Before House Immigration Committee on H. R. 6127, superseded by H. R. 9980*, 76th Cong., 1st Sess., p. 492. The age of expatriation was reduced from twenty-one to eighteen, *Hearings, supra*, pp. 492, 493.

The Immigration and Nationality Act of 1952 (66 Stat. 267; 8 U. S. C. 1481) substantially reenacted the expatriation provisions of the 1940 Act. Under the 1952 Act violation of the Selective Training and Service Act creates a presumption that departure from the United States was for the purpose of evading the draft. 8 U. S. C. 1481(a)(10). By amendment in 1954, conviction for communist activity has been added as a ground of expatriation. 68 Stat. 1146; 8 U. S. C. 1481(a)(9).

Throughout the years, we have, therefore, steadily increased the statutory grounds for expatriation. Today, we have more stated grounds for expatriation than any other country in the world.[6] Other countries, particularly

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[6] Under the 1952 Immigration and Nationality Act (8 U. S. C. 1481, 1482) there are twelve stated grounds for the expatriation of native-born citizens. Most foreign countries recognize foreign naturalization as a ground of expatriation. Only Liberia and the Philippines appear to recognize the taking of a foreign oath as a basis for expatriation. Andorra alone authorized expatriation for participation in a foreign election. Only four countries (Bulgaria, Greece, Poland and Turkey) sanction expatriation upon the ground of draft evasion, *Laws Concerning Nationality* (United Nations Legislative Series, 1954).

the dictatorships may be more arbitrary in depriving their citizens of their birthright.[7] We, on the other hand, have recognized that expatriation is a natural right of the individual and that it is his "voluntary renunciation or abandonment of nationality and allegiance" which is the essence of this natural right. *Perkins* v. *Elg*, 307 U. S. 325, 334.

B. Background of Enactment of 401(j) of the Nationality Act of 1940

On March 3, 1865, before the right of expatriation was recognized as natural and inherent right of all people, Congress enacted a bill providing:

> "That, in addition to the other lawful *penalties* of the crime of desertion * * * all persons who have deserted the military or naval service of the United States, * * * shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship * * * and all persons who, being duly enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States, with intent to avoid any draft into the military or naval service, duly ordered, shall be liable to the *penalties* of this section." (Emphasis supplied.) 13 Stat. 490.

In *Trop* v. *Dulles*, 356 U. S. 86, 89, this Court observed that the meaning of the phrase "rights of citizenship" was not entirely clear. No case was ever presented under the 1865 Act in which an attempt was made to deport a violator of its provisions.

What is clear, however, is that the 1865 Act prescribed penalties. The language of the Act so states. The first and leading case under the Act was *Huber* v. *Reily*, 53 Pa.

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[7] In the Union of the Soviet Socialist Republics expatriation may be decreed by order of the Presidium of the Supreme Council. *Laws Concerning Nationality*, *supra*, p. 463.

St. 112 (1866) in which Judge (later Mr. Justice) Strong noted that the Act was "highly penal" and that the penalty of forfeiture of citizenship could not be imposed without providing the constitutional safeguard given the accused in a criminal proceeding. He said:

> "It (the act) means that the forfeiture which it prescribes, like all other penalties for desertion, must 'be *adjudged* to the convicted person, after trial by court-martial, and sentence approved.'"

The decision was later approved, and its result adopted by this Court. *Kurtz* v. *Moffitt*, 115 U. S. 487, 501. In submitting the draft of the 1940 Nationality Act to Congress, the Secretary of State, the Attorney General and the Secretary of Labor referring to Sections 1996 and 1998 of the Revised Statutes which replaced the Act of March 3, 1865, stated:

> "The provisions of Sections 1996 and 1998 are distinctly penal in character." *Hearings Before House Immigration Committee on H. R. 6127, superseded by H. R. 9980*, 76th Cong., 1st Sess., p. 492.

In 1912 the 1865 statute was amended to make it inapplicable in time of peace (37 Stat. 356) and it remained in effect until repealed by the Nationality Act of 1940 (54 Stat. 1172).

During World War II, the Department of Justice discovered:

> "that in the western district of Texas, in the vicinity of El Paso alone, there were over 800 draft delinquents recorded in the local Federal Bureau of Investigation office, born in this country and, therefore, citizens who had crossed the border into Mexico for the purpose of evading the draft * * *." *House Report 1229*, 78th Cong., 2nd Sess., p. 2.

Beset with the problem of punishing these draft delinquents, the Attorney-General determined to expatriate and

banish them from the United States by permanently barring their return. This would both punish such persons for their crime as well as eliminate the expense incident to criminal prosecution and the inconvenience of keeping their files open. J. P. Sharon of the Immigration and Naturalization Service writing on *Loss of Citizenship by Draft Dodgers* in the Monthly Review of the Service for February, 1948, page 97, makes this clear:

> "In the Fall of 1943, the Department of Justice took stock of the numerous cases of citizens who had registered with their local draft boards and departed from the United States. They declined to return to this country when called upon to do so. * * * By such action, these individuals sought to elude United States military service and to escape prosecution for violation of the Selective Training and Service Act of 1940 as amended. The Attorney General noted that these persons could not be extradited and that prosecutions for violation of the 'draft' act would have to wait upon the return of these draft dodgers to our jurisdiction. It was felt that such draft delinquents were unworthy of citizenship.
>
> "In a report to Congress, the Attorney General brought the above situation to its attention and recommended legislation looking to the expatriation of such draft delinquents, as well as to their exclusion from the United States when they attempted to return. By such action, the expense incident to their prosecution for 'draft' violations would be obviated."

On February 16, 1944, the Attorney General addressed a letter to the Chairman of the Senate Immigration Committee, calling his attention to the many citizens who had left the country to avoid military service. He stated:

> "While such persons are liable to prosecution for violation of the Selective Service and Training Act of 1940, if and when they return to this country, it

> would seem proper that in addition they should lose their United States citizenship. Persons who are unwilling to perform their duty to their country and abandon it during its time of need are much less worthy of citizenship than are persons who become expatriated on any existing grounds.
>
> • • •
>
> "Adequate precedent exists for the suggested legislation in that during the First World War a statute was in force which provided for the expatriation of any person who went beyond the limits of the United States with intent to avoid any draft into the military or naval service (37 Stat. 356)."[8] *House Report 1229, supra*, pp. 2-3.

The Attorney General thus invoked the "highly penal", 1865 Act (as amended in 1912) as precedent for the statute which became 401(j) of the Nationality Act of 1940. Contrary to appellant's claim (Br. 55-56), he made no distinction between the punitive nature of prosecutions for violations of the Selective Service Act and the loss of citizenship which he sought to impose.

Neither in the reports of the Immigration Committees (House Report 1229, Senate Report 1075, 76th Congress, 2nd Session) nor in the Congressional debates is a word mentioned about foreign involvements or the exercise of the war powers. On the contrary, members of Congress affirmatively indicated that the legislative purpose of the measure was punishment of draft delinquents. Nor, is the Congressional purpose established, as appellant intimates (Br. 55-56), by mere "individual references" in "colloquial language" and "common parlance" to "penalties" by isolated congressmen. The Representative and Senator who were responsible for the legislation in Congress stated its purpose in categorical language.

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[8] Identical language was employed in a letter of the Attorney General to the Director of the Bureau of the Budget on September 18, 1944.

Chairman Dickstein of the House Immigration Committee who piloted the bill through the House of Representatives stated:

> "I would classify this piece of legislation as a bill to denaturalize and denationalize all draft dodgers who left this country knowing that there was a possibility that they might be drafted in this war * * *.
>
> * * *
>
> "Any man, any American, who leaves this country for the purpose of not serving in time of war is a traitor, in my judgment." 90 Cong. Rec. 3261-2.

Senator Russell, Chairman of the Senate Immigration Committee, likewise observed on the floor of the Senate (90 Cong. Rec. 7629):

> "Certainly those who, having enjoyed the advantages of living in the United States, were unwilling to serve their country or subject themselves to the Selective Service Act, should be penalized in some measure."

From the statements of the executive authors of the legislation, as well as from the Congressional sponsors, it is evident that Section 401(j) had no non-penal objectives whatever. There was no relief sought from "embroilments with foreign nations" (Br. 54). There was no objective "to persuade the evading fugitive to return to perform his service" (*ibid.* 54-55). See *infra* under Point III. Least of all was there an intent to "regulate" the draft evader (*ibid.*, 55, 57). Indeed, his expatriation is the very abnegation of regulation.

Section 401(j), based on the precedent of a punitive Civil War and World War I statute, it seems plain, has a single, exclusive purpose—to visit an additional punishment upon those persons who fled the United States during time of war to avoid service in this country's armed forces.

I

Section 401(j) Imposes a Punishment Barred by the Eighth Amendment.

In *Trop* v. *Dulles*, 356 U. S. 86, four members of this Court held that denationalization could not be inflicted as punishment for desertion, that substance rather than the form of the statute controlled, that the nature of the statute depended upon the evident purpose of the legislature, and that "denationalization as a punishment is barred by the Eighth Amendment." Mr. Chief Justice Warren observed in his opinion at pages 93-94:

> "Section 401(g) decrees loss of citizenship for those found guilty of the crime of desertion. It is essentially like Section 401(j) of the Nationality Act, decreeing loss of nationality for evading the draft by remaining outside the United States. While Section 401(j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed, Section 401(g), the provision in this case, accords the accused deserter at least the safeguard of an adjudication of guilt by court martial."

In answer to the distinctions which appellant attempts to make between the instant case and *Trop* v. *Dulles*, we submit the following comments:

1. The Civil War and World War history of 401(j) is identical with that of 401(g). As this Court recognized in the case of *Trop* v. *Dulles*, these antecedents were highly penal and loss of citizenship, like other penalties, only followed a conviction.

2. With the codification of the Nationality Laws in 1940, the paths of the two sections parted. While expatriation was continued for deserters in 401(g), the Cabinet Com-

mittee which submitted the proposed codification to Congress omitted that section of the Act of March 3, 1865 (13 Stat. 490) which provided for expatriation of draft evaders. Although Congress enacted the Selected Training and Service Act on September 16, 1940, and adopted the codification of the Nationality Laws a month later in the same session on October 14, 1940, it did not at that time provide for the expatriation of draft delinquents.

Thus, whatever significance may attach to the fact that the "expert Cabinet Committee on which Congress quite properly and responsibly relied * * * stated that the provision in question 'technically is not a penal law'" [See *Trop*, Dissenting Opinion of Mr. Justice Frankfurter, 356 U. S. at 125 (fn. 4)] is not available here. Section 401(j), as we have noted above, became a part of the Nationality Act at the request of the Attorney General whose concern was solely to impose an additional penalty upon draft evaders. The Congressional debate reaffirmed this purpose.

The history of 401(j), therefore, as detailed above in Point B, reveals a distinct and definite Congressional purpose to punish the draft evader, even were one to assume that 401(g) had no such purpose. Extradition was not possible for draft evaders who went to foreign shores. Accordingly, in lieu of extradition and criminal prosecution in the United States, they were to be punished by denationalization and permanent exclusion from the United States. This is so because under Section 3 of the Immigration Act of 1917, as amended [58 Stat. 746, 8 U. S. C. 136(d)(1)] and Section 212(a)(22) of the Immigration and Nationality Act [66 Stat. 184, 8 U. S. C. 1182(a)(22)], persons who have been guilty of draft dodging by departure from the United States are permanently barred from entering the United States.

The language of Mr. Chief Justice Warren, in the *Trop* case is particularly pertinent here (356 U. S. at pp. 96-97):

> "If the purpose of the statute imposes a disability for the purpose of punishment—that is, to reprimand

> the wrongdoer, to deter others, etc., it has been considered penal.
>
> * * * * Plainly legislation prescribing punishment for the crime of desertion is penal in nature. If loss of citizenship is substituted for imprisonment, it cannot fairly be said that the use of this particular sanction transforms the fundamental nature of the statute."

The imposition of loss of citizenship for the draft evader who leaves the United States is likewise clearly a penalty.

3. Although appellee, Mendoza-Martinez, was convicted of draft evasion, such conviction is not a necessary or essential prerequisite for a finding of expatriation. See *Perez v. Brownell*, 356 U. S. 44, *Matter of C. A.*, 2 I & N Dec. 378.

4. Expatriation was not imposed herein as a consequence of the draft evasion conviction but rather as a result of the administrative finding by the Board of Immigration Appeals that appellee had departed and remained outside the United States for the purpose of evading the draft.

The crime of draft evasion as defined in the statute (50 U. S. C. App. 311) does not include all of the elements required by Section 401(j). This appellee's conviction would not support his expatriation in the event Section 401(j) provided for a criminal trial.

5. Appellant seeks to avoid the application of the *Trop* case, upon the ground that appellee in the instant case is a dual national, and upon the basis that the relatively few litigated cases (the number of which is not disclosed) all involved dual nationals.

The short answer to this contention is that the statute applies equally to those persons who are dual nationals and to those who possess only American citizenship. (See Department of Justice Circular No. 3893, reproduced in

the Appendix.) For those who are not dual nationals, the statute produced statelessness, with all the fears and loss of rights noted by this Court in the *Trop* case. Whether a dual national or a single national, the statutory scheme would visit expatriation, banishment and exile. Madison's Report on the Virginia Resolution on the Alien and Sedition Laws, 4 *Elliott's Debates*, 455. This naked vengeance, in the words of Mr. Justice Brennan:

> "* * * constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into useful paths of society, it excommunicates him and makes him, literally, an outcast." 356 U. S. 86, at 111.

As in the *Trop* case, therefore, it stretches the imagination to establish a rational relation of mere retribution to the ends purported to be served by the expatriation of the draft dodger.

6. The factor which we believe does distinguish *Trop* from the present case reinforces our position that denationalization here violates the Eighth Amendment as a cruel and unusual punishment. The dissenting opinion of Mr. Justice Frankfurter (*Trop*, 356 U. S., at 125) suggests that denationalization cannot be said to be a cruel and unusual punishment for an offense that is capital. If this is true, it seems needless to argue that to impose statelessness and exile upon the appellee is indeed a punishment, and one that is cruel and vengeful, in relation to an offense for which the maximum penalty is five years confinement and $10,000 fine. (Section 11, Selective Training and Service Act of 1940, 54 Stat. 894; 50 U. S. C. App. 311.) See *Weems* v. *United States*, 217 U. S. 329; *O'Neil* v. *Vermont*, 144 U. S. 323; "The Expatriation Act of 1954", 64 Yale Law Journal 1164, fn. 131 at p. 1188.

II

Expatriation and Exile of the Draft Delinquent Is Not Justified by the Exercise of the Foreign Affairs Powers.

Perez v. *Brownell*, 356 U. S. 44, sustained the expatriation of an individual who voted in a foreign political election upon the ground that the statute was a valid exercise of the foreign affairs powers of Congress. The statutory history revealed Congressional concern over participation by Americans in the polities of foreign countries. "Taking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the United States * * *." *Hearings Before House Immigration Committee on H. R. 6127, superseded by H. R. 9980*, 76th Cong., 1st Sess., p. 491.

Unlike the legislative background of 401(e), the history of Section 401(j) discloses no concern at all by Congress or by the Executive with any impact the problems of fugitive draft evaders might have had upon our international relations. The guidance which Congress received from the Executive, and upon which it relied, came not from the State Department, which one might suppose to be its source were the problem a matter of foreign affairs (*Perez* v. *Brownell*, 356 U. S. 44, 56), but came rather from the Attorney General, whose sole, stated concern was to impose loss of citizenship, *in addition* to liability to prosecution upon "persons who are unwilling to perform their duty to their country and abandon it during its time of need". H. Rep't 1229, 78th Cong., 2nd Sess., pp. 2-3.

The letter which the Attorney General wrote to Congress referred to draft delinquents "who had crossed the border into Mexico for the purpose of evading the draft" but it

contained no reference to any issues this may have posed for United States-Mexican relations. No suggestion at all is made that "international complications" (Appellant's Brief, p. 38) had been caused by the fugitive draft evaders. Although many of the fugitives, like the appellee, were dual nationals, the Executive sponsor of the legislation was utterly silent as to any question regarding foreign allegiance of the draft evaders.[9]

Appellant nonetheless argues that the "potentiality of foreign embroilment through fugitive draft evaders is not fanciful", and he suggests that the statute is reasonably related to the foreign affairs power because "the termination of citizenship terminates the (international) problem." (Brief, pp. 41-44, citing *Perez*, 356 U. S. at 60.)

The impediment in the appellant's argument is that whatever embroilment may follow from the problem of fugitive draft evaders is neither caused by their United States citizenship nor is it solved by expatriation. The obligation to serve in the armed forces was imposed not merely upon citizens but upon "every other male person residing in the United States", within certain age limits. Selective Training and Service Act of 1940, Section 3(a); 54 Stat. 885; 50 U. S. C. App. 303(a). Cf. *McGrath* v. *Kristensen*, 340 U. S. 162.

The fugitive who flees the United States to escape the draft may, therefore, be a resident alien as well as a citizen, 32 C F. R., 611.12. International problems might well arise, as appellants suggest, if other nations became "refuges or centers for American draft evaders" (Brief, p. 38). But

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[9] In contrast to State Department and Congressional silence on any international implications arising from the flight of fugitive draft delinquents between 1940, when the Nationality Act went into effect, and 1944, when Section 401(j) was enacted, both the Secretary of State and Congress directed attention to other aspects of the Selective Training and Service Act which did have international repercussions. Cf. *Moser* v. *United States*, 341 U. S. 41.

the basis for protest would be the grant of refuge for draft delinquents whether citizens or not. Such does not exist here.

The possible repercussions upon United States relations with a foreign country which harbored violators of our laws would not be different if the fugitives were rumrunners (see especially *Ford* v. *United States*, 273 U. S. 593), or tax evaders, bank robbers, narcotic offenders (see concurring opinion of Mr. Justice Brennan in *Trop*, 356 U. S. at 113), spies (Cf. *Rosenberg* v. *United States*, 346 U. S. 273), saboteurs and manufacturers of defective war material (Cf. 18 U. S. C. 2151-2156), persons who obstruct the draft or interfere with the armed forces (Cf. *Schenck* v. *United States*, 249 U. S. 47), plotters against friendly foreign governments (Cf. *Wiborg* v. *United States*, 163 U. S. 632, and *Gayon* v. *McCarthy*, 252 U. S. 171), or pirates (Cf. *United States* v. *Smith*, 5 Wheat. 153), none of whom is denationalized by flight from the jurisdiction of the United States.

The nationality of the criminal is irrelevant to the offense. So, too, is the nationality of the draft delinquent. The offender's nationality is equally irrelevant to the effect which a foreign refuge for American law violators would have upon our relations with the country which offered such refuge. Clearly, it is the harboring of violators of our laws which would impair the relations, not the grant of refuge merely to those among the fugitive offenders who happened to be United States nationals.

The problem is not solved by denationalization. The fugitive draft evader is not relieved of his obligation to serve in the armed forces by his flight. Nor is he absolved of guilt for his crime, as the appellee's experience witnesses.[10]

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[10] Appellee, in the Government's view then an alien, was prosecuted and convicted for violation of the Selective Training and Service Act following his return to the United States.

The issue here, then, is not at all like that in *Perez*, where "termination of citizenship terminates the problem" because the expatriate's obligation to the United States is thereby dissolved and his involvement in foreign political elections is thereafter of no concern to this country. Termination of the appellee's citizenship terminates no international problem if in fact one exists. Termination of the appellee's citizenship performs one sole function—the one which Congress and the Attorney General intended—that of imposing upon him an additional punishment.

III

Expatriation and Exile for Draft Evasion Is Not a Proper Exercise of the War Powers.

We have noted in our historical summary that for many years expatriation could not take place during wartime. Secretary of State Fish feared that it would encourage desertion and aid to the enemy. Under 401(j) of the Nationality Act of 1940, instead of encouraging the citizen to return to the United States, instead of giving him another opportunity to serve his country, we denationalize and banish him forever. Under 401(g) restoration to active duty during wartime or reenlistment during wartime restored nationality. No comparable provision is made in 401(j). It is, therefore, obvious that rehabilitation was no concern of Congress in the enactment of the present statute.

The language of Mr. Justice Brennan in *Trop* v. *Dulles*, 356 U. S. 109, 113, relating to the deserter, is equally pertinent here to the draft evader:

> "It is difficult, indeed, to see how expatriation of the deserter helps wage war except as it performs that function when imposed as punishment. It is obvious that expatriation cannot in any wise avoid the harm apprehended by Congress. After the act of desertion, only punishment can follow, for the harm has been done. • • •

> "* * * it stretches the imagination excessively to establish a rational relationship of mere retribution to the ends purported to be served by the deserter. * * * As citizens we are also called upon to pay our taxes and to obey the laws, and these duties appear to me to be fully as related to the nature of our citizenship as our military obligations. But Congress' asserted power to expatriate the deserter bears to the war powers precisely the same relation as its power to expatriate the tax evader would bear to the taxing power."

The views of Mr. Justice Brennan find support, indeed, in the contemporaneous construction of the statute given by the Department of Justice. In its Circular No. 3893, issued on December 5, 1944, following the enactment of the statute, the Attorney General referred to the "substantial number of Selective Service delinquency cases involving aliens or dual citizens" who departed the United States for the "apparent purpose of evading military service".

As to these persons, the Attorney General declared:

> "It is anticipated that many such delinquents will attempt to return to the United States as the probability of being called for service becomes more and more remote. Under Public Law No. 431, such delinquents are ineligible for reentry, either as debarred aliens or expatriates, and in order that their cases may be closed in the offices of the United States Attorneys and the Federal Bureau of Investigation, the following procedure is suggested and authorized:
>
> "(1) The United States Attorney shall examine his file and the investigative reports in each case, and upon determination that Public Law No. 431 [78th Cong.] is applicable, shall close the case, and notify the Field Office of the Federal Bureau of Investigation of his action.
>
> "(2) Federal Bureau of Investigation will thereupon close its file in the case and furnish the Immigration and Naturalization Service with all information pertinent to the application of Public Law No.

> 431, and the application of the law from an administrative viewpoint, shall thereafter be the responsibility of the Immigration and Naturalization Service.
>
> "(3) The United States Attorney shall notify the State Director of Selective Service of the names, order numbers and Local Boards of all such closed delinquency cases so that his records and those of the Local Boards may be appropriately noted."

Thus the contemporaneous construction of the statute by the very Department which is charged with its enforcement establishes that its design was far from a "plan to provide equitably for the armed defense of the nation", as appellant claims, "at the time when military manpower is most needed," (Br. 45), and quite the opposite of "an effort to persuade the evading fugitive to return to perform his service or to submit to justice" (Br. 54-55). It was, on the contrary, a deliberate device to close the borders of the United States to those draft delinquent citizens who were expected to "attempt to return * * * as the probability of being called for service becomes more and more remote".

As to citizens of the United States, who do not have dual nationality, the Attorney General directed a different procedure. Their cases:

> "* * * should be continued in a pending status at the present time so that consideration may be given to the matter of prosecution in the event of subsequent apprehension in the United States. At the same time, however, the facts in all such cases should also be made available by the Federal Bureau of Investigation, to the Immigration and Naturalization Service and also, where appropriate, to the State Department."

For these persons, too, it is thus clear that they were to be excluded from the United States through the offices of the Immigration and Naturalization Service and the State

Department. It is only in the "event of [their] subsequent apprehension in the United States" that "consideration would be given to the matter of prosecution".

Appellant's argument that Section 401(j) is valid because of "its close and direct connection with the war power" (Br. 44-47), although it would seem to have facile support, is plainly without merit in the light of its expressed executive and legislative purpose (*supra*), as well as its contemporaneous administration construction. See *Power Reactor Development Co.* v. *IUE*, 367 U. S. 396 (1960); *Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 (1932).

Moreover, this argument is vitiated by the decision of this Court in *Trop*. The opinion of the Chief Justice for four members of this Court declared, even if the statute is an exercise of war power, that it must be judged as a penal law "because it imposes the sanction of denationalization for the purpose of punishing transgression of a standard of conduct prescribed in the exercise of that power". *Trop*, 356 U. S. at 97.

The concurring opinion there of Mr. Justice Brennan, at 114 which finds that expatriation of the wartime deserter from the armed forces lacks "the requisite rational relation • • • [to] • • • the war power" applies with even greater force here, where the draft evader, unlike Trop, the Army deserter, has never been subject to military discipline.

Nor, in view of the explicitly-stated purpose of the statute and its administrative construction, is the dissenting opinion in *Trop* support for the appellant's position here. For the opinion of Mr. Justice Frankfurter expressly finds that the expatriation of wartime military deserters may be deemed "needed in order that control may be had over evasions of military duty when the armed forces are committed to the Nation's defense, and that the deleterious

effects of those evasions may be kept to the minimum." *Trop* at 121.

As we have shown, the present statute had no such purpose. The contention, therefore, that expatriation of the draft evader may be sustained as a valid exercise of the war power should be rejected.

IV

Expatriation and Exile for Draft Evasion Is Not a Proper Exercise of Sovereignty.

Apart from the powers to regulate foreign relations and to conduct war, the appellant seeks to sustain Section 401(j) because it is said to derive from the "inherent rights of sovereignty" (Br. 47-51).

The Government's argument, we believe, is based upon erroneous premises. The appellant's first premise is that the right to expatriate flows from the right to enforce military duty. It seems obvious the power to raise an army by conscription is not the power to denationalize an unwilling conscript, any more than the power to tax is the power to expatriate. The opinions of Mr. Chief Justice Warren and of Mr. Justice Brennan in *Trop* dispose of the contention repeated here by the appellant that denationalization here "cannot be deemed arbitrary" because of the withdrawal of the individual from * * * acceptance of United States jurisdiction and of the citizen's obligation to support the nation in time of emergency" (Br. 50).

What applies to the express war power necessarily governs the powers which are inherent in sovereignty. Section 401(j) has no greater "rational relation" (*Trop*, concurring opinion of Mr. Justice Brennan, 356 U. S. at 114) to the power of sovereignty than Section 401(g) has to the war power.

Appellant's second premise—that "one who removes himself physically from the jurisdiction of the country in order to elude the grasp of our law * * * terminates the contract" (of citizenship) (Br. 49) is rebutted by the footnote 24 in his brief (Br. 45), citing *Blackmer* v. *United States*, 284 U. S. 421, as well as by his citation of *Kawakita* v. *United States*, 343 U. S. 717, 736, in which it was said: "An American citizen owes allegiance to the United States wherever he may reside."

The power which the Federal Government concededly has to compel citizens abroad to return to the United States "whenever the public interest requires it" (*Blackmer* v. *United States*, 284 U. S. 421, at 438), derives from the principle that the United States retains jurisdiction over its absent citizens.[11] The United States has the power to serve process over citizens abroad and can require them to attend its courts whenever properly summoned (*ibid.*). Its ultimate power permits the United States to enforce penalties against its citizens for violations of its laws (*ibid.*). (See also *United States* v. *Bowman*, 260 U. S. 94, 102.) Cf. Section 11, Selective Training and Service Act (54 Stat. 894; 50 U. S. C. App. 311) which provides for imprisonment for not more than five years or a fine of not more than $10,000, or both.

In a word, the United States national who resides abroad is never "wholly beyond its jurisdiction and power." (Br. 55) The severance of allegiance of a citizen is, therefore, not at all a recognition of any lack of power of the sovereign over the fugitive draft evader, as suggested by the appellant, but, as described by Mr. Justice Brennan, nothing more than naked vengeance.

Moreover, the legislative history of Section 401(j) refutes appellant's contention. In his letter to the Chairman

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[11] This is to be distinguished, of course, from the power of extradition which goes to the relation of the United States to a foreign government rather than to a citizen abroad, *supra*, at page 21.

of the Senate Immigration Committee the Attorney General stated that:

> "If and when they (draft delinquents) return to this country, it would seem proper that in addition (to the penalties under the Selective Training and Service Act) they should lose their citizenship." (*House Report 1229, supra*, page 2.)

If expatriation is determined *if and when the draft evaders return to the United States* it cannot be argued that the United States is then without power over fugitive draft evaders.

Indeed, appellant concedes that the initial determination that a national has been expatriated "will often be made by the Executive Branch, when it seeks to deport him as an alien illegally in the country, or to exclude him from entering the country (if he is outside), or to deny him a passport or some other right available to citizens" (Br. 51). Thus, the nationals whom the government seeks to expatriate not only have not "eluded the grasp of our law", but they are within the direct control of various agencies of the Executive Branch. Appellant's argument that Section 401(j) is a valid exercise of the inherent power of sovereignty cannot be sustained.

V

Section 401(j) Violates Procedural Due Process.

It has been noted that Section 401(j) "decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed". (*Trop*, Opinion of Mr. Chief Justice Warren, 356 U. S. at 94.)

The appellant, in response, concedes as true that an administrative agency can determine that a citizen is guilty

of draft evasion and has been expatriated, but says rather irrelevantly that there is no violation of due process because the citizenship claimant "*was* entitled to bring a declaratory judgment action to establish his citizenship under the Nationality Act of 1940" (Br. 51-52).[12] (Emphasis supplied.)

Even were this a complete statement of an expatriated citizen's procedural rights, whether the proper verb is "was" as the present Solicitor General says, or is "is," as the former Solicitor General says, it is clearly no substitute for the requirements which due process imposes before a citizen of the United States may be denationalized.

Huber v. Reid, *supra*, which this Court approved in *Kurtz v. Moffitt*, *supra* (see *Trop*, concurring opinion of Mr. Justice Brennan, 356 U. S. at 108), requires a trial and conviction upon the charge of desertion before expatriation can be imposed. The force of this opinion was recognized by the Cabinet Committee which proposed the enactment of 401(g), and that provision accordingly provided that expatriation could take effect only following a conviction. Codification of Nationality Laws, H. R. Comm. Print, Pt. I, 76th Cong., 1st Sess.

If due process requires that the deserter be convicted before he may be denationalized, no less can be required for the draft evader.[13] Significantly, although appellant

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[12] It is not without interest that the present Solicitor General has receded from the position taken by his predecessor in this appeal who stated in his brief in *Mackey v. Mendoza-Martinez*, No. 29, October Term, 1959 (Br. 31), that the citizenship claimant "*is* entitled to bring a declaratory judgment action to establish his citizenship" (Emphasis supplied.)

[13] It should be noted that appellee's conviction under Section 11 of the Selective Training and Service Act could be solely for "evad[ing] registration [or Service]" in the armed forces, whereas the expatriating conduct under 401(j) is for "departing from or remaining outside of the jurisdiction of the United States in time of war * * * or national emergency for the purpose of evading or avoiding training and service." Cf. 54 Stat. 894 with 58 Stat. 746.

argues that 401(j) does not violate due process, nowhere in his brief does he seek to distinguish the present case from *Huber* v. *Reily*. The principle of the *Huber* case, having received the gloss of approval of this Court as early as 1885 in *Kurtz* v. *Moffit*, *supra*, and direct approval in *Trop*, and the imprimatur of Congress when it enacted 401(g), must apply equally to an expatriation under Section 401(j). *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365.

Apart from this fundamental defect in Section 401(j), the citizenship claimant's rights in a declaratory judgment proceeding are not protected as fully as the appellant suggests (Br. 52-53).

First, it should be noted that Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. 903, was repealed by Section 403(a)(41) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 280, 8 U. S. C. 903. Therefore, unless the right of the citizen to bring a declaratory judgment action under that statute has been preserved by the saving clause of the latter statute, 66 Stat. 405, 8 U. S. C. 1101 [Cf. *Dulles* v. *Richter*, 246 F. 2d 709 (C. A. D. C. 1957); *Juns Fujii* v. *Dulles*, 224 F. 2d 906 (9th Cir., 1955)], Section 503 actions are no longer available to citizenship claimants.

This is especially significant for the expatriated citizen who is outside of the United States. While the declaratory judgment procedure is still available to the citizenship claimant under the general Declaratory Judgment Act, 28 U. S. C. 2201, and a review of an agency decision is available under the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009 [14] [see *Frank* v. *Rodgers*, 253 F. 2d 889 (C. A. D. C. 1958), and *Tom Muna Ngow* v. *Dulles*, 122 F. Supp. 709 (D. C. 1954)], neither of these remedies assure to the national abroad, who has been ruled expatriated

[14] Appellant here disagrees. This question is before this Court in the companion case, *Rusk* v. *Cort*, No. 20, this term.

by the administrative decision, the right to come to the United States and to appear personally in a judicial proceeding to enforce his claim. (Cf. *Rosasco* v. *Brownell*, 163 F. Supp. 45 (E. D. N. Y. 1958) and cases cited at 50-55.)

An expatriated citizen's right to appear in a court in the United States to testify in support of his nationality derives at present from the provisions of Section 360(b) of the 1952 Act, 66 Stat. 163, 273, 8 U. S. C. 1503. The issuance of a certificate of identity to enable the expatriated citizen to be admitted to the United States is there conditioned upon submitting "proof to the satisfaction of [a] diplomatic or consular officer that such action was instituted in good faith and upon a substantial basis * * * " (*supra*). Thus, the very ability to appear in a court in the United States to prove citizenship is made dependent upon satisfying the consular officer who has expatriated the citizen that the claim is "substantial". At present there is a division in the lower courts whether action lies to compel the Secretary of State to issue a certificate of identity to an expatriated citizen. Cf. *Dulles* v. *Lung*, 212 F. 2d 73 (9th Cir. 1954), and *Ling* v. *Dulles*, 119 F. Supp. 513 (D. C. 1954) (action does not lie), with *Sing* v. *Dulles*, 116 F. Supp. 9 (E. D. N. Y. 1953); *Acina* v. *Brownell*, 112 F. Supp. 15, 19 (S. D. Tex. 1953); *D'Argent* v. *Dulles*, 113 F. Supp. 933, 937 (D. C. 1953) (action lies if the refusal is arbitrary or capricious). Even the view most favorable to the expatriated citizen, however, accords the claimant only a review of the administrative refusal, which, needless to say, offers the expatriated citizen far less protection than either an absolute right to appear in court, or a *de novo* determination of his right to appear.

If the expatriated citizen should be unsuccessful in obtaining entry into the United States to testify on his own behalf, the result is the very "spectacle of a trial *in absentia*" which the appellant deplores (Br. 52).

But this is not all. If we assume that the expatriated citizen is able to obtain a certificate of identity, what then are his rights? They are set forth at Section 360(c) of the Act, *supra*:

> "A person who has been issued a certificate of identity under the provisions of subsection (b) and while in possession thereof, may apply to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States."

Appellant, again irrelevantly, refers to the repealed Section 503 of the Nationality Act of 1940 to say that "the trial *was* de novo" (Br. 52). Whether an expatriated citizenship claimant who is seeking entry to the United States is entitled to a *de novo* determination of his claim to citizenship (Br. 52) has not yet been firmly settled by this Court. Cf. *United States* v. *Ju Toy*, 198 U. S. 253, and *Tang Tun* v. *Edsell*, 223 U. S. 673, with *Ng Fung Ho* v. *White*, 259 U. S. 276. Compare also *Medeiros* v. *Watkins*, 166 F. 2d 897 (2nd Cir. 1948) with *Carmichael* v. *Delaney*, 170 F. 2d 239 (9th Cir. 1948).

But not even this problem is the end of the expatriated citizen's difficulties. Appellant admits (Br. 52) that even in a *de novo* trial, the plaintiff has the initial burden of establishing "the fact of his having been a citizen". Thus, at the very threshold of his case the expatriated citizen, whether abroad or in the United States, like the appellee, is met with a burden which is upon the Government in all

other judicial proceedings involving loss of citizenship. Cf. denaturalization proceedings, *Schneiderman* v. *United States*, 320 U. S. 118, 158. *Baumgartner* v. *United States*, 322 U. S. 665, 675; *Nowak* v. *United States*, 356 U. S. 660, 663; *Maisenberg* v. *United States*, 356 U. S. 670, 672.

In bald words, the national who has been ruled expatriated for draft evasion by an administrative decision, without a prior hearing, without prior conviction, without final sanction by a court, must nonetheless submit himself to the jurisdiction of the courts and agencies of the United States as though he were an alien. If he is an expatriated citizen outside the United States, his posture is that of an alien seeking admission to this country for the first time. Cf. *Shaughnessy* v. *Mezei*, 345 U. S. 205.

"This happens", the appellant explains in a blithe condonation (Br. 21), "because the officials, like the courts are required to enforce the statute and must apply it to the particular cases coming before them".

In view of the exacting procedures and standards of proof which this Court has required in denaturalization proceedings, it seems scarcely necessary to argue that a national of the United States may not be stripped of his citizenship, under the expatriation provisions of the nationality laws, by administrative fiat and then left to vindicate his rights before the courts as an alien outside the United States.

Whatever rights and privileges aliens may have in the United States, this Court has held from *United States* v. *Ju Toy*, *supra*, to *Shaughnessy* v. *Mezei*, *supra*, and *Leng May* v. *Barber*, 357 U. S. 185, with one exception, that due process is what Congress says it is for aliens who are not "in the United States." Cf. *Chew* v. *Colding*, 344 U. S. 590.

Therefore, the United States citizen, who has been denationalized "by the initial determination" of an adminis-

trative agency, may therefore, like *Mezei, supra*, if the appellant is correct, be held in detention and afforded no constitutional guaranty of due process at the threshold of the United States, while he attempts to vindicate his right to citizenship. Unlike an accused criminal in the United States, he is not even assured the right to make bail. His proceeding to enforce his claim to citizenship may, in these circumstances, become an empty form. If the slate of this Court in regard to decisions affecting aliens is "not clean" (*Galvan* v. *Press*, 347 U. S. 522, at 531) there seems little justification for eroding the rights of citizens of the United States by marking them down upon the slate which the decisions of this Court have hitherto reserved for aliens.

For the reasons we have given we believe that Section 401(j) violates the due process clause of the Fifth Amendment.

CONCLUSION

The appellant seeks in effect, to reargue the case of *Trop* v. *Dulles*, 356 U. S. 86, which has recently been the subject of two presentations to this Court. The authority of that case justifies a holding that 401(j) of the Nationality Act of 1940 is invalid.

Respectfully submitted,

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September, 1961.

APPENDIX

DEPARTMENT OF JUSTICE

Washington 25, D. C.

December 5, 1944

CIRCULAR No. 3893

TO ALL UNITED STATES ATTORNEYS AND ALL FIELD OFFICES OF THE FEDERAL BUREAU OF INVESTIGATION AND THE IMMIGRATION AND NATURALIZATION SERVICE

Re: Public Law No. 431 (78th Congress): An Act to expatriate or exclude certain persons for evading military and naval service.

The above-mentioned Act (1) provides for automatic expatriation of a citizen of the United States who departs from, or remains outside of, the country during time of war or national emergency for the purpose of avoiding or evading military service, and (2) prohibits reentry to the United States of any alien who departed from the United States for the same purpose.

A substantial number of Selective Service delinquency cases involving aliens or dual-citizens who registered under the Selective Service Act while residing in the United States and who have since departed therefrom for the apparent purpose of evading military service are now being carried in a pending status by the United States Attorneys and the Field Offices of the Federal Bureau of Investigation. Extradition for prosecution in such cases is impossible.

It is anticipated that many such delinquents will attempt to return to the United States as the probability of being called for service becomes more and more remote. Under Public Law No. 431, such delinquents are ineligible for reentry, either as debarred aliens or expatriates, and in order that their cases may be closed in the offices of the United States Attorneys and the Federal Bureau of In-

vestigation, the following procedure is suggested and authorized:

(1) The United States Attorney shall examine his file and the investigative reports in each case, and upon determination that Public Law No. 431 is applicable, shall close the case, and notify the Field Office of the Federal Bureau of Investigation of his action.

(2) The Federal Bureau of Investigation will thereupon close its file in the case and furnish the Immigration and Naturalization Service with all information pertinent to the application of Public Law No. 431, and the application of the law from an administrative viewpoint shall thereafter be the responsibility of the Immigration and Naturalization Service.

(3) The United States Attorney shall notify the State Director of Selective Service of the names, order numbers and Local Boards of all such closed delinquency cases so that his records and those of the Local Boards may be appropriately noted.

The cases of United States citizens (other than so called dual citizens) who may have departed from or remained outside of the United States for the purpose of avoiding military service require different treatment than the cases of aliens or dual citizens. Such cases should be continued in a pending status at the present time so that consideration may be given to the matter of prosecution in the event of subsequent apprehension in the United States. At the same time, however, the facts in all such cases should also be made available by the Federal Bureau of Investigation, to the Immigration and Naturalization Service and also, where appropriate, to the State Department.

Where any doubt is entertained as to the disposition of any delinquency case which may fall within the purview of Public Law No. 431, the matter should be taken up with the Criminal Division in the Department.

FRANCIS BIDDLE,
Attorney General.